(5)

No. 84-476

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT MCDONALD,

Petitioner,

—v.—

DAVID I. SMITH,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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INTEREST OF AMICUS CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members, dedicated to defending the rights secured by the Constitution and laws of the United States. The ACLU has long been particularly interested in preserving those freedoms whose source is the First Amendment to the Constitution. The ACLU has participated, directly or as amicus curiae, in numerous First Amendment cases in the Court over the past decades.

This case raises the question whether an individual citizen may communicate privately with federal officials regarding matters of public concern, i.e., the qualifications of an applicant to a high federal office, without fear of having to defend that communication in an expensive and

lengthy libel action. The ACLU submits this brief amicus curiae to urge the Court to hold that in the circumstances of this case, the Petition Clause of the First Amendment provides the Petitioner, Mr. Robert McDonald, with an absolute defense to Respondent David I. Smith's action for libel.

The ACLU also urges that this Court seize the opportunity presented by this case to revisit the "actual malice" standard set forth in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The ACLU believes that, as Judge Robert Bork of the District of Columbia Circuit Court of Appeals recently wrote, the New York Times v. Sullivan standard "seems not to have provided in full measure the protection for the marketplace of ideas that it was designed to do," and that "a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards, has

threatened to impose a self-censorship on the press which can as effectively inhibit debate and criticism as would overt governmental regulation that the first amendment most certainly would not permit." Ollman v. Evans, No. 79-2265 (D.C. Cir. Dec. 6, 1984) (Bork, J., concurring).

Twenty years of experience with the New York Times standard should lead this Court to hold that no governmental official or candidate for office may institute an action for libel premised upon allegedly defamatory statements if those statements relate to the official's public duties, acts, functions or responsibilities. Such a rule would fully realize the guarantees of freedom of speech,

freedom of the press, and freedom to petition that are contained in the First Amendment.[1/]

SUMMARY OF ARGUMENT

The First Amendment guarantees to each citizen the right to petition the government for the redress of grievances. The defendant and Petitioner here, Mr. Robert McDonald, was sued because he tried to exercise that right by communicating to the President of the United States his concerns about the qualifications of an applicant to a high federal position, Mr. David I. Smith.

The First Amendment precludes recovery by Smith in his defamation action against McDonald. The right "to have one's voice heard and one's view considered by the

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1/ Letters from all parties consenting to the filing of this brief have been lodged with the Clerk of the Court.

appropriate government authority" is the very essense of democracy. Williams v. Rhodes, 393 U.S. 23, 41 (1968) (Harlan, J., concurring). The freedom to address one's government without fear of retribution benefits both the speaker and the recipient of the message, as this Court explained almost twenty-five years ago in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137 (1961):

> "In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."

In granting absolute immunity from civil liability for statements made in connection with judicial proceedings, legislative proceedings, and quasi-judicial administrative proceedings as well as for statements made

to and by law enforcement officers regarding suspected criminal activity, this Court and the courts of most jurisdictions have demonstrated a practical concern for the fullest and freest possible flow of information vital to the adjudicatory and legislative functions. Because the petition to the government for the redress of grievances is functionally indistinguishable from the citizen's report regarding potential criminal activity, "for which no action of libel or slander will lie," In Re Quarles, 158 U.S. 532 (1895), the Court should hold that no civil liability may be premised upon bona fide petitioning activity.

The Court should also bar recovery by Smith against McDonald on the ground that no governmental official or candidate for office may seek recovery for reputational injuries if that recovery is based upon statements

relating to the official's public duties, acts, functions or responsibilities. The actual malice standard set forth in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), has fallen short of providing the "breathing space" that First Amendment freedoms require in order to survive, for that standard has not prevented an alarming rise in libel suits intended to stifle political speech, nor has it eliminated the real danger of jury verdicts premised upon hatred for unpopular views and issued with near total disregard for precious First Amendment values.

The First Amendment grants to each citizen the right to criticize official conduct despite the harm that may flow from excess in the heat of debate. As Justice White has written, the "central meaning" of the First Amendment, "as it relates to libel laws, is that seditious libel -- criticism

of government and public officials -- falls beyond the police power of the state." Gertz v. Robert Welch, Inc., 418 U.S. 323, 388 (1974) (White, J., concurring).

ARGUMENT

I. THE PETITION CLAUSE OF THE FIRST AMENDMENT PROHIBITS THE IMPOSITION OF LIABILITY FOR ALLEGEDLY DEFAMATORY COMMUNICATIONS TO FEDERAL OFFICIALS CONCERNING APPLICANTS FOR FEDERAL OFFICE.

The First Amendment to the United States Constitution provides that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."

The right to "petition the Government for redress of grievances" is "among the most precious of the liberties safeguarded by the Bill of Rights." United Mine Workers v. Illinois State Bar Association, 389 U.S. 217, 222 (1967). This case involves a classic exercise of the right to petition, and it offers this Court an unparalleled opportunity to safeguard that most precious right. The plaintiff and Respondent here, David I. Smith, an unsuccessful applicant for a position as a United States Attorney in North Carolina, claims that letters sent by defendant and Petitioner Robert McDonald to the President of the United States and to certain other federal officers contained defamatory statements regarding Smith's professional qualifications. Smith's complaint also alleges, in conclusory language, that McDonald knew the statements in question were false

at the time he made them and that he acted out of malice and with "evil and wicked intent."

Simply put, the First Amendment's Petition Clause precludes recovery by Smith. A long line of federal and state decisions have held that the First Amendment bars civil liability premised upon bona fide petitioning activity. See, e.g., California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 514 (1972) (petitions to administrative agencies and to courts cannot give rise to antitrust liability in absence of allegation that petitioning activity "effectively barr[ed] [plaintiff] from access to the agencies and courts"); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965) (hereinafter "Pennington") (joint efforts to influence governmental action do not violate Sherman Act regardless of intent or purpose);

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137 (1961) (hereinafter "Noerr") (same); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980) (suit for damages under 42 U.S.C. §1983 dismissed because First Amendment right to petition for zoning change is absolute); Missouri v. National Organization For Women, Inc., 620 F.2d 1301 (8th Cir.), cert. denied, 449 U.S. 842 (1980) (NOW boycott directed at Missouri absolutely privileged under Petition Clause); Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530, 542 (5th Cir. 1978), cert. denied, 444 U.S. 924 (1979) (writing to State Board of Medical Examiners to request investigation of possible violations of Medical Practice Act is protected petitioning activity); Stern v. United States Gypsum, Inc., 547 F.2d 1329 (7th Cir. 1977), cert. denied, 434 U.S. 975 (1978)

(42 U.S.C. §1985(1) suit dismissed in part because Petition Clause provides defense to claims concerning complaints to an IRS agent's supervisor); Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976), cert. denied, 430 U.S. 940 (1977) (lobbying efforts directed against plaintiff's application to operate restaurant are protected by First Amendment); Weiss v. Willow Tree Civic Ass'n, 467 F.Supp. 803 (S.D.N.Y. 1979) (complaints based upon 42 U.S.C. §§1982, 1983 and 1985(3) dismissed because petitions to town officials were absolutely privileged); J.P. Stevens & Co., Inc. v. Maynard Jackson, et al., 85 Lab.Cas. [CCH] 10,980 (N.D.Ga. 1978) (defendants' boycotting and lobbying activities shielded by First Amendment from liability under 42 U.S.C. §1983); Aknin v. Phillips, 404 F.Supp. 1150, 1153 (S.D.N.Y.

1975) (protests to local officials regarding discotheque operation protected by right to petition); Sierra Club v. Butz, 349 F.Supp. 934, 935 (N.D.Cal. 1972) (lobbying efforts directed to Secretary of Agriculture protected by Petition Clause); Sherrard v. Hull, 456 A.2d 59, 63-67 (Md.App.), aff'd, 460 A.2d 601 (Md. 1983) (absolute privilege afforded petitioning activity which included allegations of bribery made at county hearing on zoning designation); Webb v. Fury, 282 S.E.2d 28 (W.Va. 1981) (lobbying efforts relating to government regulation of corporation's surface mining activities protected by Petition Clause); Matossian v. Fahmie, 101 Cal.App.3d 128, 161 Cal.Rptr. 532 (1980) (efforts to persuade Department of Alcoholic Beverage Control not to grant liquor license to plaintiff protected by First Amendment).

The analysis primarily employed in the above decisions is simple, straightforward, and convincing. In Noerr this Court explained that the right to petition is fundamental to our system of government:

> "In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."

Noerr, 365 U.S. at 137.[2/]

In Stern v. United States Gypsum, Inc., 547 F.2d at 1342, the Seventh Circuit similarly concluded that "the right to

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2/ Although the Court in Noerr did not expressly ground its decision upon the Petition Clause, it noted in California Motor Transport Co., 404 U.S. at 510-511, that the Noerr holding was in fact based upon the right to petition.

petition is logically implicit in and fundamental to the very idea of a republican form of government." At issue in Stern were complaints of unprofessional conduct that had been lodged with an IRS agent's superiors by employees and officers of a company undergoing an IRS audit. The Court held that the defendants' communication of these complaints was a "classic" exercise of the right to petition:

> "We think it plain that presenting complaints to responsible government officials about the conduct of their subordinates with whom the complainer has had official dealings is . . . central to the protections of the right to petition."

Id. at 1343.

The Seventh Circuit in Stern concluded that there was "no doubt that the prospect of a federal lawsuit resulting from any citizen complaint about the conduct of federal

officials could chill the exercise of the right to petition." Id. Accordingly, the Court held that the defendants' constitutionally protected petitioning activities were privileged against any claim under §1985(1).

In the more recent case of Sherrard v. Hull, 456 A.2d 59 (Md.App. 1983), aff'd, 460 A.2d 601 (Md. 1983), the court held that a citizen's comments regarding zoning matters to a county board of commissioners could not constitutionally form the basis of a defamation action. After a lengthy review of the Noerr-Pennington line of cases, as well as decisions from state courts involving petitioning activities, the Sherrard court concluded that the "modern, better reasoned cases hold that true petitioning activity should be absolutely privileged." Id. at 70. "The decision we make today," the court

stated, "is founded upon the necessity of a legislative body to receive information enabling it to legislate. The right of petition is a necessary element of our representative government. . . ." Id.

The District Court in this case did conclude, quite properly, that McDonald's "alleged conduct falls within the general protection afforded by the petition clause of the first amendment." Smith v. McDonald, 562 F.Supp. 829, 838-839 (M.D.N.C. 1983). Nevertheless, the District Court held that McDonald was not entitled to the summary dismissal of Smith's claim because "Smith can prevail [at trial] provided he proves actual malice by McDonald." Id. at 843, citing New York Times v. Sullivan, 376 U.S. 254, 279-280 (1964).

The District Court's application of the "actual malice" standard here is wholly inappropriate and contrary to logic and precedent. This Court protected petitioning activities in Noerr and in Pennington, for example, despite allegations and indeed findings that those activities were "malicious and fraudulent," Noerr, 365, U.S. at 133, and had an "illegal purpose," Pennington, 381 U.S. at 669. As Judge Zirpoli explained in Sierra Club v. Butz, 349 F.Supp. at 938, the application of an "actual malice" standard is insufficient protection for that "most precious" of liberties, the right to petition for the redress of grievances:

> "[T]he malice standard invites intimidation of all who seek redress from government; malice is easy to allege under modern pleading rules . . . and therefore in most cases even those who acted without malice would be put to the burden and expense of defending a lawsuit. Thus, the malice standard does not supply the 'breathing space' that

> First Amendment freedoms need to survive."

See also Stern v. United States Gypsum, Inc., 547 F.2d at 1345 ("It is easy enough to allege knowing falsity in a complaint and thus to avoid . . . a motion to dismiss. . . . Defendants . . . then would . . . face full-blown litigation. . . . This spectre alone could lead a citizen . . . contemplating the lodging of a good faith complaint to reconsider").

The "functional approach to immunity law" that this Court has regularly employed also supports the establishment of an absolute privilege for bona fide petitioning activity. Harlow v. Fitzgerald, 457 U.S. 800, 810 (1982). The Court's functional analysis has led it to recognize "that the judicial, prosecutorial and legislative functions require absolute immunity." Id. at 811. The

rationale for cloaking the prosecutorial function with absolute immunity, for example, was explained in Butz v. Economou, 438 U.S. 478, 518 (1978), as premised upon the fear that if prosecutors or even administrative agency attorneys "were held personally liable in damages as guarantors of the quality of their evidence, they might hesitate to bring forward some witnesses or documents." This same practical concern for the fullest and freest flow of information vital to the adjudicatory process has led many courts to hold that reports to law enforcement officers of suspected criminal activity are absolutely privileged.3/

3/ See, e.g., In Re Quarles, 158 U.S. 532, 535-536 (1895) (a private citizen's report to "executive officers" regarding potential criminal activity "is a privileged and confidential communication, for which no action of libel or slander will lie"); Rusack v. Harsha, 470 F.Supp. 285, 297 (M.D. Pa. 1978) (reporting "possible violations of

(footnote continued on next page)

There is no reason to place any higher priority on the goal of crime prevention and punishment than on the goal of attaining a

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federal law" to federal officers is "constitutionally protected" and "cannot form the basis of a defamation action"); Cushman v. Edgar, 44 Or.App. 297, 605 P.2d 1210, 1212 (1980) (letter to Governor requesting investigation of alleged police brutality "was absolutely privileged as a report to a proper officer of government concerning alleged law violations. . . ."); McGranahan v. Dahar, 119 N.H. 758, 408 A.2d 121, 128 (1979) (". . . a person wrongfully accused of a crime must bear that risk, lest those who suspect wrongful activity be intimidated from speaking about it to the proper authorities for fear of becoming embroiled themselves in the hazards of interminable litigation"); Gabriel v. McMullin, 127 Iowa 426, 103 N.W. 355 (1905) (statements made to city attorney absolutely privileged on the ground that "[a] party having knowledge of facts tending to show that a crime has been committed will hesitate to lay such facts before the proper officer if the information thus given may be made the basis of an action for damages against him").

truly "representative democracy . . . [which] depends upon the ability of the people to make their wishes known to their representatives." Noerr, supra, 365 U.S. at 137. Accord, Sherrard v. Hull, 456 A.2d at 70 (founding absolute privilege for petitioning activity upon "the necessity of a legislative body to receive information enabling it to legislate").

The right "to have one's voice heard and one's view considered by the appropriate governmental authority" is the very essence of democracy, Williams v. Rhodes, 393 U.S. 23, 41 (1968) (Harlan, J., concurring). That right may not be conditioned by a state upon "the exaction of a price," Garrity v. New Jersey, 385 U.S. 493, 500 (1967), or "punishment," Thornhill v. Alabama, 310 U.S. 88, 101-102 (1940), or "threat of criminal or civil sanctions," Nebraska Press Assn. v.

Stuart, 427 U.S. 539, 559 (1976), or, as here, by "a federal lawsuit," Stern v. United States Gypsum, Inc., 547 F.2d at 1343. This Court should therefore hold that Robert McDonald's letters to the President of the United States and his top aides cannot form the basis of a libel action by the allegedly defamed subject of those letters, David I. Smith.

II. THE COURT SHOULD HOLD THAT NO ACTION FOR LIBEL OR SLANDER MAY BE PREMISED UPON COMMUNICATIONS RELATING TO OFFICIAL ACTS, FUNCTIONS, OR RESPONSIBILITIES

As demonstrated in section I, above, David I. Smith's libel action against Robert McDonald presents to this Court an opportunity to provide substantial protection for that "most precious" of liberties, the right to petition for the redress of grievances. Mr. Smith's suit poses a broader question as

well: whether the First Amendment provides to a citizen an unconditional privilege to criticize his government and its officials.

In New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964), the Court held that a public official could recover in an action for libel upon proof that the defendant had published defamatory falsehoods with "actual malice." Twenty years of experience with the New York Times standards and its shortcomings have established that, as Justice Black had warned,

> "[t]he requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment."

Id. at 293 (Black, J., concurring).

The past few years have seen a remarkable increase in libel actions, with a corresponding and even more remarkable increase in libel actions brought by public officials against those who dare to criticize official acts and policies. In a recent magazine article, reporter Anthony Lewis noted, for example, that Senator Paul Laxalt has sued the McClatchy Newspapers for two hundred and fifty million dollars over an article that reported allegations linking Laxalt to illegal "skimming" of Nevada casino revenues; that former Israeli Defense Minister Ariel Sharon has brought a fifty million dollar libel suit against Time Magazine over an article describing Sharon's role in the Sabra and Shatila massacres in Lebanon; and that General William C. Westmoreland is seeking one hundred and twenty million dollars in damages from CBS in a libel action stemming

from a CBS documentary on the Vietnam war. See Lewis, "Annals of Law: the Sullivan Case," The New Yorker, November 5, 1984, pp. 84-85. Lewis could have also listed Massachusetts Governor Edward J. King's 1.8 million dollar libel suit against the Boston Globe, which charged that a number of articles, editorials and political cartoons in that newspaper had libeled Gov. King. "Suit Against Globe Stands," New York Times, April 3, 1983, at 30, col. 4. Mr. Lewis concludes that "the novel phenomenon of libel actions by high public officials raises special concern," in part because "the American tradition is to the contrary." Lewis, supra, at 85, 90.

Concern over the recent increase in multimillion dollar libel actions involving public affairs is not limited to such longtime supporters of press freedom as Mr. Lewis.

In his concurrence to the recent decision by the D.C. Circuit in Ollman v. Evans, No. 79-2265 (D.C. Cir. December 6, 1984) (available December 27, 1984 on LEXIS, Genfed library, Cir file), Judge Robert Bork commented that "a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards, has threatened to impose a self-censorship on the press which can as effectivley inhibit debate and criticism as would overt governmental regulation that the first amendment most certainly would not permit." Judge Bork concluded that the 'actual malice' standard laid down in New York Times "seems not to have provided in full measure the protection for the marketplace of ideas that it was designed to do." Id.

For a number of reasons, the actual malice standard has indeed fallen short of providing the "breathing space" that First

Amendment freedoms require in order to survive. First, by premising liability upon a determination of the defendant's state of mind, the actual malice standard sharply increases the likelihood that libel actions will proceed to trial without summary adjudication. As this Court noted in Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979), the question of a party's motive "does not readily lend itself to summary disposition." As a result, even those libel defendants who in good faith exercise their constitutional rights to criticize or comment upon public affairs or official actions or policies can be put to the burden and expense of defending a lawsuit through lengthy trial and appellate proceedings. Second, and as Judge Bork points out, "the evidence is mounting that juries do not give adequate attention to limits imposed by the first

amendment and are much more likely than judges to find for the plaintiff in a defamation case." Ollman v. Evans, supra (Bork, J., concurring).4/

Thus, the actual malice standard not only prolongs the expense and burden of a libel action, but by allowing such actions to reach juries almost as a matter of course, the standard increases the danger of verdicts issued with near total disregard for precious First Amendment values and freedoms.

4/ Interviews with five of the six jurors charged with deciding William Tavoulareas' libel action against the Washington Post, for example, revealed that that jury, which awarded Tavoulareas over two million dollars in compensatory and punitive damages, never even discussed the 'actual malice' standard and its application to that case, despite the trial judge's instructions to the contrary. Brill, "Inside The Jury Room at The Washington Post Libel Trial," The American Lawyer, Nov., 1982, at 1, 93-94.

Third, and most important, permitting a public official or candidate for office to recover damages from a citizen who has criticized, with or without malice, recklessly or not, the official's actions, qualifications, or policies is totally repugnant to the First Amendment's promise of freedom. The First Amendment "presupposes that the freedom to speak one's mind is not only an aspect of individual liberty--and thus a good unto itself--but also is essential to the common quest for truth and the vitality of society as a whole." Bose Corporation v. Consumers Union of United States, Inc., ___ U.S. ___, 104 S.Ct. 1949, 1961 (1984). Freedom to speak one's mind about the conduct of government, moreover, is the very essence of democracy. As Justice Black explained in his concurrence to New York Times:

> "To punish the exercise of this right to discuss public affairs or to penalize it through libel judgments is to abridge or shut off discussion of the very kind most needed. This Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials. 'For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it.'"

376 U.S. at 297, quoting 1 Tucker, Blackstone's Commentaries 297 (1803).

Justice Roberts had struck a similar chord almost twenty-five years before in his landmark opinion in Cantwell v. Connecticut:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been or are prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."
>
> Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

History joins with this logic to compel the conclusion that no civil liability may be premised upon criticism of officials and their actions. There is no longer any question that, as Justice White has written, "seditious libel . . . falls beyond the police power of the state." Gertz v. Robert Welch, Inc., 418 U.S. 323, 388 (1974) (White, J.,

concurring). Congress' sole attempt at codifying the notion of seditious libel, the Sedition Act of 1798, was recognized as unconstitutional shortly after its passage. The Sedition Act made it a crime to "defame . . . or to bring . . . into contempt or disrepute" the government of the United States or certain of its officials. This attempt to stifle political speech, which by its terms punished only criticisms that were both false and made with malicious intent, has "generally been treated as having been a wholly unjustifiable and much to be regretted violation of the First Amendment." New York Times v. Sullivan, 376 U.S. at 296 (Douglas, J., concurring). As Justice Brennan explained for the Court in New York Times,

> "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the

> ground that it was unconstitutional."

New York Times v. Sullivan, 376 U.S. at 276 n.16. See also Rosenblatt v. Baer, 383 U.S. 75, 81 (1966) (the Constitution does not tolerate "prosecutions for libel on government . . . in any form.").

Seditious libel becomes no more palatable, and no more constitutional, moreover, when it arms itself with the power to levy civil fines rather than prison terms. "What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." New York Times v. Sullivan, 376 U.S. at 277. Indeed, civil actions--with their lesser burdens of proof and potential for enormous damage awards--pose "hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law."

Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). Consequently, because those citizens who dare to criticize official acts or actors may not constitutionally be criminally prosecuted for their criticisms, malicious or not, those same critics--whether CBS or Robert McDonald--may not constitutionally be forced to bear liability in, or the costs of defense of, a civil libel suit.

The First Amendment affords each citizen an absolute, unconditional privilege to criticize official conduct despite the harm that may flow from excess in the heat of debate. That is the First Amendment's paramount guarantee. As Justice White has written, the "central meaning" of the First Amendment, "as it relates to libel laws, is that seditious libel--criticism of government and public officials--falls beyond the police

power of the state. In a democratic society such as ours, the citizen has the privilege of criticizing his government and its officials." Gertz, 418 U.S. at 388 (White, J., concurring).

CONCLUSION

For all the foregoing reasons, the decision of the court below should be reversed. The Petition Clause of the First Amendment stands as an absolute bar to civil liability premised upon bona fide petitioning activities such as tnose engaged in by the Petitioner here. The Court should also hold that no government official or candidate for government office may institute an action for libel premised upon allegedly defamatory statements if those statements relate to the official's public duties, acts, functions, qualifications, or responsibilities, for only

such a rule will fully realize the promise of freedom contained in the First Amendment.

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